put it out of his power and control up to the time of the happening of of the contingency. Undoubtedly the latter doctrine results from the above mentioned confusion of "deeds presently" and escrows, for such a rule is applicable only to escrows. In an absolute delivery, if the estate passes at all, it must pass at the first delivery. This, in turn, depends for the most part upon the grantor's intent. But how could the grantor intend to vest the estate in the grantee by the first delivery when, by the terms of the deposit, the deed is to be returned to him at a given date, without the grantee's assent, if the grantor be then living? Such a reservation by the grantor is incompatible with an absolute delivery.

H. S. D. C.

Evidence: Grounds for Admission of Parol Evidence to Prove that a Deed, Absolute on its Face, is a Mortgage.—The case of Mittlesteadt v. Johnson,[1] suggests the question, upon what grounds is parol evidence admitted to prove that a deed though absolute on its face, is in fact a mortgage? The question arises only in courts of equity, and it has long been the accepted rule in all except two jurisdictions, where it is expressly prohibited by statute, that such courts will allow the introduction of parol evidence to show that a deed, absolute on its face, was in reality intended as a mortgage. While the rule is well settled, the grounds for the introduction of such evidence are stated differently in different jurisdictions.

In the earlier English cases such evidence was admitted in cases where the defeasance had been omitted by fraud or accident,[2] where the grantee made a separate defeasance, although it was merely a verbal one,[3] or where the payment of interest or other circumstances made it appear that the conveyance was meant as a mortgage.[4] The English courts admit oral evidence to prove that a deed, absolute on its face, is in fact a mortgage, only on purely equitable grounds and whenever equitable considerations are lacking, relief is refused.

The Federal courts do not limit the introduction of parol evidence to cases of fraud or mistake, but admit it where the defeasance has been omitted by design upon mutual confidence between the parties. Such evidence is admitted to show the real intention of the parties as well as the real nature of the transaction. Mr. Justice Field, in Peugh v. Davis[5] says, "As the equity upon which the court acts in such cases, arises from the real character of the transaction, any evidence written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That can-

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[1] (Sept. 29, 1913) (Wash.), 135 Pac. 214.
[2] England v. Codrington, (1758) 1 Eden. 169.
[3] Manlove v. Bale, (1688) 2 Vern. 84.
[4] Cripps v. Jee, (1793) 4 Bro. C. C. 472.
[5] (1877) 96 U. S. 332.

not be qualified or varied from its natural import, but must speak for itself. The rule does not forbid the inquiry into the object of the parties in executing and receiving the instrument."

In the various state jurisdictions parol evidence of this nature was, in the earlier cases, received only in cases of fraud or mistake and the courts of a few states still hold this to be the only ground which justifies the admission of such evidence. In most jurisdictions, however, it is deemed sufficient evidence of fraud for the grantee to treat the conveyance as absolute, when it was not so intended, and the tendency of the later cases is to admit such evidence to show the nature of the transaction and the intention of the parties, even though there is no allegation of fraud or mistake. The intention of the parties always governs, and if the deed was intended as a security for a debt, it is always a mortgage. The Statute of Frauds was at first supposed to stand in the way of allowing such a deed to be proved a mortgage by parol evidence. The courts were finally forced, however, to establish such a doctrine, in order to prevent a statute, designed to prevent frauds, from itself becoming an instrument of fraud and injustice. It is no violation of the statute to introduce evidence of the real agreement as an element in the proof of fraud in the transaction and as relief is granted by setting aside the deed, such evidence is admitted to justify the court in impeaching the instrument, and not to substitute a different contract in its place. In some few states, the intention of the parties to create a security for a debt, is regarded only as raising a trust in favor of the grantor, which equity will enforce.

In California, parol evidence is admissible at law as well as in equity,[6] although the proof must be clear and convincing, before a deed, absolute on its face, will be declared a mortgage.[7] Evidence of the circumstances and relations existing between the parties is admitted, not for the purpose of contradiction or varying the written instrument, but to show a state of facts dehors the instruments, raising an equity superior to its terms.[8] The deed must speak for itself but the intention of the parties in executing the instrument may be looked into. Fraud in the use of the instrument is as much a ground for the interference of a court of equity, as fraud in its creation.

A. H. C.

Evidence: The Privilege of One Spouse not to Testify "for or against" the Other.—At common law neither spouse was a competent witness for or against the other. In modern law,[1] this incompetency has been removed, leaving two distinct privileges, which may be waived by such consent as the statute requires. They are (1) that no testimony be given by one spouse against the other as party, and, (2) that no testimony be given by either spouse in any

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[6] Jackson v. Lodge, (1868) 36 Cal. 28.
[7] Henley v. Hotaling, (1871) 41 Cal. 22.
[8] Pierce v. Robinson, (1859) 13 Cal. 116.